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Administration of justice at the United Nations

Administration of justice in the Secretariat: role of the Panels on Discrimination and Other Grievances

Report of the Secretary-General*

Summary

The present report is submitted in response to General Assembly resolution 57/307, in which the Assembly requested the Secretary-General, in consultation with the Ombudsman and staff representatives, to submit detailed proposals on the role and work of the Panels on Discrimination and Other Grievances for consideration by the Assembly at its fifty-eighth session. The report contains options concerning the role of the Panels for consideration by the Assembly.

* The present report, originally envisaged to form part of the comprehensive report of the Secretary-General on the administration of justice in the Secretariat, is being submitted as a separate document pursuant to the request of the Fifth Committee, which was conveyed to the Secretariat in mid-August 2004.

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I. Background

A. Formal and informal recourse mechanisms in the Secretariat

1. The United Nations Secretariat has a *formal* and an *informal* recourse mechanism for resolving employment-related disputes.

2. The *formal* recourse system comprises two stages of formal litigation: first, before the Joint Appeals Board, a joint peer review body with staff-management composition, which establishes the facts and makes recommendations to the Secretary-General;[1] and second, before the United Nations Administrative Tribunal, which renders binding judgements.

3. The *informal* recourse system presently includes, inter alia, the Panels on Discrimination and Other Grievances and, since October 2002, the Office of the United Nations Ombudsman. The informal recourse mechanism aims to avoid the formalization of complaints and the triggering of the formal litigation process, which is both costly and cumbersome. In addition, whereas the formal recourse system only deals with complaints that derive from appealable administrative decisions, the informal recourse system can also deal with complaints that do not necessarily result from an administrative decision but from such sources as interpersonal difficulties in the workplace. Owing to its very nature and design, the informal recourse system is therefore more flexible and less constrained than the formal one.

B. The Panels on Discrimination and Other Grievances

4. The Panel to Investigate Allegations of Discriminatory Treatment in the United Nations Secretariat was established in 1977 as an informal grievance procedure, initially to deal with allegations of discriminatory treatment. Similar Panels were established at major duty stations away from headquarters in 1978. In 1983, the terms of reference of the Panels were broadened to cover all types of staff grievances and the Panels were accordingly renamed as Panels on Discrimination and Other Grievances (see ST/AI/308/Rev.1, para. 1). The mandate of the Panels is to seek to resolve the grievances by informal means or, where this proves impossible, by recommending appropriate action to the Assistant Secretary-General for Human Resources Management.

5. Recourse to the Panels was designed to supplement the formal recourse procedures, namely the Joint Appeals Board, the specialized appeals bodies and the United Nations Administrative Tribunal, and to emphasize mediation. It was considered that staff members would find such an informal mechanism preferable in that an amicable settlement could be reached more easily through it than through formal litigation.

6. In actual practice, however, the Panels have not functioned as intended and consideration has been given repeatedly in the past to the issue of whether it would be in the interest of the Organization to replace them with an Ombudsman system (see A/C.5/41/14, para. 14). As indicated in recent reports of the Panels, they have

[1] The formal recourse system also comprises specialized appeals bodies for such narrowly defined situations as rebuttals of performance appraisals or appeals against classification of posts.

been underutilized by the staff and their recommendations have not always been heeded by the Administration. One important reason for this stems from the fact that the Panels lack the statutory power of the Joint Appeals Board or of an Ombudsman to have access to all the persons and documents necessary for their work and they consequently cannot easily or always obtain the information and data they seek when they investigate staff grievances. In addition, members of the Panels lack training in mediation and substantive legal know-how and their findings may not be supported by evidence.[2] For these reasons, the recommendations of the Panels were often not acceptable to the Administration from a procedural and/or policy point of view.

C. Creation of the Office of the United Nations Ombudsman

7. For the reasons noted above, in two reports (see A/55/253, annex V, para. 3; and A/56/800, paras. 27-30), the Secretary-General proposed the replacement of the Panels with the Ombudsman institution.[3] It was considered that the elimination of the Panels and the establishment of a full-time, neutral and independent Ombudsman, with flexibility of method, who could engage in informal dispute resolution, with a clear reporting line to the Secretary-General and access to all high-ranking officials, would streamline and strengthen the informal dispute resolution process.

8. In its resolution 55/258, the General Assembly welcomed the proposal of the Secretary-General to establish an Ombudsman function, and in paragraph 79 of its resolution 56/253, decided to establish the position of Ombudsman at the level of Assistant Secretary-General in the Office of the Secretary-General. The terms of reference of the Ombudsman were promulgated in Secretary-General's bulletin ST/SGB/2002/12 and the Office of the United Nations Ombudsman started functioning on 25 October 2002. Pursuant to those terms of reference, the Ombudsman has wide authority "to consider conflicts of any nature related to employment by the United Nations. The term 'conflict' is to be construed in its broadest sense and includes, inter alia, matters pertaining to conditions of employment, administration of benefits, managerial practices, as well as professional and staff relations matters." As to the manner to be employed by the Ombudsman in the informal resolution of grievances, the terms of reference accord the Ombudsman maximum flexibility by providing that the Ombudsman may use "any appropriate means for the primary objective of settling conflicts between parties and obviate recourse to the formal grievance process". To that end, while the Ombudsman does not have decision-making powers, he or she "shall advise and make suggestions or recommendations, as appropriate, on actions needed to settle conflicts, taking into account the rights and obligations existing between the Organization and the staff member, and the equities of the situation".

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[2] See, for example, United Nations Administrative Tribunal Judgement No. 507, *Fayache (1991)*, in which the Tribunal rejected the findings of the Panels as unsubstantiated (although compensation was ultimately awarded to the applicant for the Administration's delay in taking action on (i.e., rejecting) the recommendation of the Panels).

[3] It should be noted that the Secretary-General had recommended, some 18 years earlier, to replace the Panels with an Ombudsman function (see A/C.5/41/14, para. 1).

9. The Assembly has not taken a final decision on whether the newly established Ombudsman function should replace the Panels, as originally proposed by the Secretary-General. Rather, in its resolution 57/307, it requested the Secretary-General, in consultation with the Ombudsman and staff representatives, to submit detailed proposals on the role and work of the Panels for its consideration.

II. Contribution from the Ombudsman on the role and work of the Panels on Discrimination and Other Grievances

10. In the light of Assembly resolution 57/307, the Ombudsman requested a team of practitioners who are trained in organizational dispute resolution to assist her Office in reviewing the functions of the Panels in order to make recommendations from the Ombudsman's perspective. With the support of the Ombudsman's Office, the team met with representatives of all entities involved in the United Nations justice system and sought their views and recommendations regarding the Panels. The team also met with the current members of the New York Panel and held teleconferences with members of the Addis Ababa, Nairobi, Geneva and Vienna Panels. After a careful study of the system of justice in the Secretariat and a comparative analysis with existing systems in other organizations, the team submitted a report to the Ombudsman.

11. The team noted that a well designed grievance system should include both formal and informal resolution mechanisms and that United Nations staff should be encouraged first to seek an informal solution. Not only do the informal procedures yield results more quickly than formal processes, but informal procedures often succeed in resolving a grievance that, for various reasons, cannot be resolved through the formal process; moreover, they can assist in obviating recourse to the formal grievance system. The team further noted that, within the informal channels, there are several organizationally supported options from which staff may choose.[4] The team took note that the Office of the United Nations Ombudsman functions within the Organization strictly as a designated neutral and an informal channel of resolution. The Ombudsman has no decision-making power, but can provide advice that is off the record and confidentially facilitate the resolution of disputes, including by means of conciliation and mediation.

12. The team observed that while the Office of the United Nations Ombudsman can provide informal resolution, it cannot be attached to formal grievance structures, for which it is always a voluntary alternative. On the other hand, although they are part of the informal recourse system, the Panels have procedural aspects that overlap with the formal grievance system of the Secretariat. They may make recommendations to the Office of Human Resources Management for specific action on complaints received. A rejection may be considered an administrative decision and form the grounds for an appeal to the Joint Appeals Board. In addition, they are mandated to make determinative investigations. The flexibility of methods that the Panels may employ, combined with their jurisdiction to examine cases that do not

[4] In addition to the Ombudsman and the Panels, United Nations staff may seek informal resolution of their grievances by resorting to (a) work colleagues and friends; (b) supervisors, human resources officers or personnel officers; (c) staff counsellors; (d) the Panel of Counsel; (e) departmental focal points for women; (f) staff representatives; and (g) members of the Joint Appeals Boards when they are acting as conciliators.

arise from specific administrative decisions, were considered by the team to be unique features which were worth retaining within the justice administration system of the Secretariat.

13. Based on feedback from the interviews and an analysis of the current Panels, the team identified the following as some of the major benefits of the Panels:

(a) They handle peer-to-peer conflicts;

(b) They have the capacity to respond to disputes informally or formally, with flexibility of methods;

(c) They can operate faster than the Joint Appeals Board;

(d) They are peer review panels and, as such, are perceived as more fair by the staff and the staff are thus part of the problem-solving and dispute resolution processes;

(e) They provide an educational opportunity for the volunteers who are members of the Panels;

(f) They foster an empathetic image and therefore are more trusted and more likely to be used by staff members.

14. Some of the concerns with the present functioning of the Panels that were expressed to the team were:

(a) There is no training for the members of the Panels in the substantive law or policy on discrimination or in fact-finding and mediation;

(b) The relationships between the Panels and other mechanisms involved in dispute resolution are poorly developed;

(c) The managerial role in establishing and supporting the Panels has largely disappeared and the process of appointing members has been handled by staff representatives only;

(d) Some reports of the Panels are inadequately substantiated;

(e) The investigations of the Panels appear one-sided and members are perceived as advocates for the staff;

(f) There is lack of action or follow-up by management on the recommendations of the Panels.

15. The team examined several options that the Organization could adopt: (a) the Panels could be maintained in their current form; (b) the Panels could be eliminated; (c) the jurisdiction of the current ad hoc harassment procedures, as set out in administrative instruction ST/AI/379 could be expanded; (d) the Panels could be retained with jurisdiction to issue binding decisions; (e) the key elements of the Panels could be transferred to reconstituted committees; and (f) the internal mediation and conciliation functions of the United Nations could be strengthened. The Ombudsman's assessment is that all of these options are compatible with the terms of reference of her office as outlined in Secretary-General's bulletin ST/SGB/2002/12. These options were submitted by the Ombudsman to the Secretary-General for consideration and review, in accordance with Assembly resolution 57/307.

16. As its preferred option, the team recommended the reconstitution of the Panels into what are termed joint grievance committees, which would seek to maintain the unique features of the Panels outlined in paragraphs 13 and 14 above. Cases for such committees could be heard by the Joint Appeals Board on appeal and then by the United Nations Administrative Tribunal. The composition of the committees would have to be sufficiently diverse and include staff from the General Service, Professional and Director levels, which would ensure that the recommendations of the committees would be more likely to be accepted and implemented. Operating guidelines would have to be formulated for the committees, including guidelines to help committee members assess discrimination cases. To bolster the effectiveness of the committees, the team called for the strengthening of all United Nations internal mediation and conciliation functions. The team also recommended that, when possible, the Office of the United Nations Ombudsman provide services at regional missions and duty stations away from headquarters.

III. Views of the staff representatives

17. The Secretary-General notes that any decision regarding the Panels would affect the staff at large and that, in its resolution 57/307, the Assembly requested him to consult with staff representatives on the subject. Owing to a variety of reasons, it was not possible to consult the staff through the Staff-Management Coordination Committee when preparing the proposals requested by the Assembly. Nevertheless, the Secretary-General took into account the views expressed by the staff representatives on the subject at the most recent meeting of the Staff-Management Coordination Committee.

18. Specifically, staff representatives had expressed the belief that a joint fact-finding panel, either the existing Panels, or a body with new terms of reference would be important to support the work of the Office of the Ombudsman. The staff representatives had also noted that the Panels on Discrimination and other Grievances at Vienna and Geneva were fully functional. Since those Panels were making a valuable contribution, the staff felt that there was no reason to abolish them.

19. In addition, the Secretary-General considered a specific proposal submitted in June 2004 by the United Nations Staff Union in New York, pursuant to which a staff member with a grievance would first have recourse to the Office of the Ombudsman and then to a formal process before a grievance panel with a composition and mandate different from the current Panels.

20. Pursuant to that proposal, the grievance panel would be composed of three voting members (a staff member representing management, a staff member selected by the person with the grievance and a third member jointly selected by the two other voting members) and three non-voting members who would serve as resources for the voting members. The non-voting members would be a Staff Council member, the Ombudsman, and a human resources officer. After consideration of the grievance, the panel would make a decision that would be binding on the Under-Secretary-General for Management.

21. The Secretary-General notes that, although the specific proposals contained in the report of the team that advised the Ombudsman and those of the New York Staff Union differ in many ways, the proposals share a common view on a number of

basic points, namely, the need to offer staff a mechanism by means of which their grievances may be considered outside the formal appeal process set out in the Staff Rules and in addition to the Office of the United Nations Ombudsman and the need to rename, refocus and restructure the existing Panels to make them a meaningful tool for resolving conflicts.

22. The Secretary-General also notes that the proposals presented by the United Nations Staff Union in New York would significantly change the nature of the role of the Ombudsman, requiring her participation in both informal and formal stages and imposing considerable constraints on the manner in which the Office of the United Nations Ombudsman discharges its mandate. While the mandate and functioning of that Office may be revised in the light of experience and after due consideration of the basis and contents of possible improvements, it may not be appropriate to do so at the present time owing to the significant progress that has already been made in the short period since the Office was established in October 2002.

IV. The views of the Secretary-General on the role of the Panels on Discrimination and Other Grievances: possible options

23. The Secretary-General is appreciative of the extensive and valuable analysis contained in the team report on the Panels and notes and agrees with its assessment that the Panels in their current form are not viable. He has considered the team's proposal to transfer some of the features of the Panels into reconstituted joint grievance committees. Recognizing the importance attached by many staff to retaining a diverse and jointly composed peer review process for resolving grievances informally, the Secretary-General presents the options below for consideration by the Assembly.

Option 1
Elimination of the Panels on Discrimination and Other Grievances: no further action

24. That the Panels on Discrimination and Other Grievances do not work effectively in their current form and should be eliminated represents the Secretary-General's position, as expressed in his earlier reports. The Secretary-General notes that this was the reason for his earlier proposals to the General Assembly (see A/55/253, annex V, para. 3; and A/56/800, paras. 27-30), namely, that the Panels be eliminated and their functions assumed by the Office of the United Nations Ombudsman.

25. However, the attention of the Secretary-General has been drawn to the observation in the team's report that if the Ombudsman were to assume the functions of the Panels, some of those functions would be incompatible with her role as outlined in the terms of reference under Secretary-General's bulletin ST/SGB/2002/12. The attention of the Secretary-General has also been drawn to the observation in the team's report regarding the importance attached by the staff to having their complaints considered by their peers at the informal level and to the fact that the Ombudsman's functions do not entail such peer review.

26. The Secretary-General believes, however, that the elimination of the Panels would not necessarily deprive staff of having their complaints considered by their peers, as this can be done informally, as part of the conciliation that may be carried out by the Joint Appeals Board (see staff rule 111.2 (b)), and formally, in the context of the formal recourse procedure of the Joint Appeals Board (see staff rule 111.2). With regard to grievances that do not relate to specific administrative decisions, staff may raise employment-related issues with the Ombudsman for informal resolution or with the Office of Human Resources Management for informal or formal resolution. The latter's decision would be appealable to the formal recourse system. It is acknowledged, however, that the means of informally resolving such grievances would not include that of a peer review.

Option 2

Transfer of some of the functions of the Panels on Discrimination and Other Grievances to new joint grievance committees

27. The Secretary-General takes note of the preferred option in the team's report to establish a successor mechanism to the Panels, which would ensure continuation of the peer review in the informal resolution of grievances. For that reason, the Secretary-General submits, for consideration by the Assembly, option 2, which essentially incorporates the proposal in the team's report, to the effect that the Panels would be abolished and that some of their functions (notably, the functions of fact-finding and of writing recommendations) would be taken over by new joint bodies of peers, to be named joint grievance committees, which would be administratively attached to the Joint Appeals Board.

28. In its report, the team recommended that the organizational set-up of the proposed joint grievance committees be administered by the Joint Appeals Board Secretary. The Secretary-General notes that under the rules of procedure of the Joint Appeals Board, the substantive functions of directing the work and operations of the Board are performed by the Joint Appeals Board Presiding Officer with the advice and support of the Joint Appeals Board secretariat. It would therefore be more appropriate in the Secretary-General's view for the presiding officer, rather than the Joint Appeals Board Secretary, to exercise oversight of the joint grievance committees and for the Joint Appeals Board secretariat to retain its support and advisory role. As there are currently four standing Joint Appeals Boards, the new joint grievance committees would need to be established in each of the duty stations where the standing Joint Appeals Boards are located, namely, New York, Geneva, Vienna and Nairobi.

29. The Secretary-General acknowledges the potentially valuable contribution of this option to the informal grievance recourse mechanism. He notes, however, that it entails significantly higher budgetary implications than the other option, as, in addition to the provision of training to the members of the joint grievance committees, further administrative support would need to be provided by the Joint Appeals Board secretariats and oversight would need to be provided by the presiding officers. It would therefore be necessary to establish of a full-time presiding officer in the New York, Geneva, Vienna and Nairobi Joint Appeals Boards, as well as to provide additional administrative support to the Joint Appeals Board secretariats in Vienna and Nairobi, which currently only operate on a part-time basis.

30. The Secretary-General would also like to draw the Assembly's attention to the considerations provided in paragraphs 31 and 32 below.

31. New grievance committees existing side by side with the Office of the United Nations Ombudsman within the informal recourse procedures may result, in some cases, in staff members resorting to both mechanisms for the informal resolution of their complaints,[5] thus potentially delaying the process and/or resulting in contradictory outcomes. As indicated in the team's report, however, option 2 offers an additional informal alternative to staff for resolving their conflicts. Moreover, the new grievance committees would continue the function of the Panels to make written recommendations to the Administration, a function that is not performed by the Ombudsman and in respect of which, therefore, there would be no risk of duplication of functions.

32. An additional consideration regarding option 2 concerns the difficulty of identifying volunteers for serving on the grievance committees. The Secretary-General notes that the system already has difficulty in finding sufficient volunteers for the Joint Appeals Board and other specialized advisory bodies that are also composed of volunteers. Assuming that enough volunteers can be identified to serve on the new committees, they would require, in order to be effective, extensive training in, inter alia, mediation and conciliation; the conduct of investigations and fact-finding; report writing; law and policy on discrimination and harassment; and the United Nations staff regulations and rules and the standards of conduct for the international civil service. The training would need to be regularly updated to ensure maximum effectiveness.

V. Conclusion

33. In conclusion, the Secretary-General believes that the Panels are not effective in their current form, though he recognizes that many staff members value their existence. If the Assembly decides to endorse option 2 above and decides to replace the Panels with the proposed joint grievance committees collocated with the Joint Appeals Board, it would be necessary that the members of the committees be provided with adequate resources in terms of training and administrative support. The implementation of option 2 would also require system-wide consultation with the staff.

[5] This is a concern that was raised by the New York Staff Union in the comments it submitted to the Secretary-General on 18 June 2004 regarding the Panels.